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No. 07-665

In the Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, ET AL.,
Petitioners,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE*, IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*

The *amici* joining in this brief represent diverse religious and secular beliefs, but share a common interest in preserving religious liberty and preventing religious discrimination.[1]

Amici have a substantial interest in ensuring that the erroneous application of free-speech principles does not weaken the Establishment Clause's strict prohibition against denominational preferences — a vital protection for freedom of conscience.

Because several *amici* have joined in this brief, more detailed descriptions of each appear in an appendix. The *amici* are:

- The American Jewish Committee, a national organization dedicated to protecting the civil and religious rights of Jews and to defending religious rights and freedoms for all Americans.
- Americans United for Separation of Church and State, a national, nonsectarian public-interest organization committed to preserving religious liberty and the separation of church and state.
- The Anti-Defamation League, organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States.

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[1] The parties have consented to the filing of this brief and have lodged consent letters with the Clerk. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici* or their counsel have made any monetary contribution to the preparation or submission of this brief.

- The Baptist Joint Committee for Religious Liberty, an organization serving fifteen cooperating Baptist conventions and conferences throughout the United States that deals exclusively with religious-liberty and church-state-separation issues.
- People For the American Way Foundation, a nationwide, nonpartisan citizens' organization established to promote and defend civil and constitutional rights, including First Amendment freedoms.

INTRODUCTION

The decision below is out of step with this Court's free-speech jurisprudence. What may not be obvious from the face of the opinion is why the panel went so badly awry. The explanation lies not so much in the panel's misunderstanding of free-speech law as in the Tenth Circuit's longstanding misapplication of another provision of the First Amendment — the Establishment Clause.

In *Anderson* v. *Salt Lake City*, 475 F.2d 29 (10th Cir. 1973), the Tenth Circuit held that the Ten Commandments are principally secular, so the government's display of them cannot *under any circumstance* give rise to Establishment Clause concerns. From that holding flowed a systematic distortion of the Circuit's First Amendment jurisprudence.

In attempting to restore coherence to free-speech law here, this Court should be mindful of the fact that the question presented is an artifact of *Anderson*; it does not fairly reflect the parties' actual dispute or the genuine issues that the controversy implicates. The Establishment Clause provides the rubric for addressing claims that government acted with religious animus, so it is to Establishment Clause jurisprudence that the courts below should turn in adjudicating this case.

BACKGROUND

The Tenth Circuit's decision in *Anderson* was one of the first Establishment Clause challenges to a religious display, and the very first, so far as we are aware, to a Fraternal Order of Eagles-donated Ten Commandments monolith. In that case, a panel of the Tenth Circuit concluded that the Ten Commandments are "primarily *secular*," so their display on public property could never be an establishment of *religion*. 475 F.2d at 34 (emphasis added).

Seven years later, however, this Court rejected *Anderson*'s premise. The Court held in *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (per curiam), that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and * * * do not confine themselves to arguably secular matters." The Court therefore struck down a Kentucky statute requiring the Decalogue's posting in public-school classrooms because the postings had no conceivable secular purpose or object. *Id.* at 41-42.

Beginning in the mid-1990s, Respondent Summum — a Utah-based church — made a series of requests to have the Seven Aphorisms of its faith displayed alongside previously erected Ten Commandments monoliths donated to Utah cities by the Eagles. Those requests having invariably been denied, Summum brought religious-discrimination actions, alleging that the cities were unconstitutionally preferring majority faiths. See, *e.g.*, *Summum* v. *City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Summum* v. *Callaghan*, 130 F.3d 906 (10th Cir. 1997). Although Summum principally raised federal Establishment Clause claims in its earlier cases, it also recognized that *Anderson* effectively barred those claims. For if, as a matter of law, the Ten Commandments are nonreligious, favoring them over the Seven Aphorisms could not constitute playing favorites among faiths. So while Summum sought to have *Anderson* overturned in light of *Stone*, it also offered the Tenth Circuit an alternative route to granting the requested relief: It repackaged its religious-discrimination claim as a free-speech one, arguing that favoring displays representing majority faiths over ones representing minority faiths constitutes content or viewpoint discrimination.

The panels in *Callaghan* and *Ogden* both expressly recognized that, "[s]ince *Anderson* was decided, * * * more recent cases, including [*Stone*], cast[] doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature." *Callaghan*, 130 F.3d at 910 n.2; accord *Ogden*, 297 F.3d at 1000 n.3 ("the health of our *Anderson* precedent is subject to question"). But they accepted

Summum's invitation to use the Free Speech Clause to curtail the religious favoritism to which Summum objected, thereby avoiding having to decide whether a three-judge panel alone could recognize *Anderson*'s demise or whether the en banc court would instead have to be convened. *Ogden*, 297 F.3d at 1000 n.3; *Callaghan*, 130 F.3d at 913 n.8. In deciding the cases that way, however, the panels stretched this Court's free-speech jurisprudence past the breaking point.[2]

Having twice won similar cases without the Tenth Circuit's being willing to reach the Establishment Clause issue, Summum opted in this case to raise only the free-speech claim, as well as a supplemental state-law religious-discrimination claim under the Utah Constitution's Establishment Clause (thus potentially sidestepping the *Anderson* morass because Utah's Establishment Clause is more strict than the First Amendment's (see *Manning* v. *Sevier County*, 517 P.2d 549, 552-553 (Utah 1973) (Callister, Henriod, and Crockett, JJ., concurring))). Although Summum raised the state-law establishment claim in the brief it filed with the district court in this case, both that court and the court of appeals decided the case under the same doctrinal framework that the Tenth Circuit had decided all the other Summum cases: free speech. So as the case now comes before this Court, only the free-speech claim has been briefed, while the more salient

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[2] In *Society of Separationists* v. *Pleasant Grove City*, 416 F.3d 1239, 1241 n.1 (10th Cir. 2005), the Tenth Circuit finally held that *Anderson* was superseded by *Van Orden* v. *Perry*, 545 U.S. 677 (2005), and *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). But *Callaghan*'s and *Ogden*'s free-speech rulings remained circuit precedent binding on the panel in this case.

clause — the Establishment Clause — receives nary a mention.

SUMMARY OF THE ARGUMENT

The ghost of *Anderson* haunts this action. The parties' litigation of the case, the record developed, and the preliminary-injunction decision now under review have all been distorted by a bad ruling that should have been recognized as defunct a decade and a half ago. So while in any other circuit this case would have been a run-of-the-mine Establishment Clause action, this Court now confronts a free-speech decision that defies reason as well as legal doctrine.

The panel below erred in holding that the items on display in Pioneer Park are private speech. The permanent monuments in the park are quintessential government speech, having been crafted or adopted by the City. And when government is the speaker, it is free to choose its message, subject to constitutional limitations on official action but not to free-speech scrutiny.

The Tenth Circuit also erred by inviting the parties to litigate under the Free Speech Clause a case for which the Establishment Clause defines the scope of the rights in question. Under the latter Clause, the relevant constitutional strictures are clear: Whatever else the Establishment Clause might mandate, it straightforwardly forbids official discrimination against minority faiths like Summum.

While the record from the preliminary-injunction proceedings is understandably thin with respect to the object of Pleasant Grove's professed display policy (because under *Callaghan* and *Ogden* the refusal to display Summum's Seven Aphorisms was a *per se* free-speech violation), there is more than a whiff of religious animus here. If Summum can prove at trial that Pleasant Grove had a discriminatory object in denying its request to display the Aphorisms in Pioneer Park, it should be entitled to some form of relief.

ARGUMENT

I. The Tenth Circuit Erred in Applying Free-Speech-Forum Analysis Because the Permanent Monuments in Pioneer Park Are Government Speech.

While *amici* do not agree with all aspects of Pleasant Grove's argument, the City is undoubtedly correct that the permanent monuments in Pioneer Park are its own speech, not private speech arising in a public forum. The court of appeals thus erred in concluding that Summum has a free-speech entitlement to have its monument permanently displayed in the Park.

A. Government can deliver its own message or use private surrogates to do so.

This Court has recognized across a spectrum of cases that speech is the government's own when the government asserts control over the message's

content — either by crafting the message itself or by commissioning others to do the scripting — even when the message is ultimately delivered by a private individual or entity. Likewise, when government adopts a previously private message, the message becomes that of the government no less than if the government had itself crafted the message.

1. Scripting

Government can, of course, write and deliver its own message. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("When the University determines the content of the education it provides, it is the University speaking"); see also *Bd. of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000) ("If * * * the University and its officials were responsible for [the challenged speech's] content, the case might be evaluated on the premise that the government itself is the speaker.").

But government can also propound a message by scripting it and then hiring private individuals to deliver it. This Court held in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), for example, that "the counseling activities" of doctors working in Title X family-planning clinics "amounted to governmental speech" (*Legal Servs. Corp.* v. *Velasquez*, 531 U.S. 533, 541 (2001) (describing *Rust*)) when the government "defined" the "scope" of that speech (*Rust*, 500 U.S. at 194, 195). See *Rosenberger*, 515 U.S. at 833 (noting that in *Rust*, "the government did not create a program to encourage private speech but instead used private speakers to

transmit specific information pertaining to its own program").[3]

2. Commissioning

But the government need not craft its own messages; it can use private surrogates to do so. This Court held in *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550, 553, 560 (2005), that an advertising campaign designed at Congress's direction by private

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[3] This Court has recognized that, in the Establishment Clause context, the government is responsible for a message that it shapes and presents, even when it does not have exclusive control over scripting the message's content. In *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 302 (2000), for example, this Court held that pre-game prayers written and delivered by students were not private speech where the school tailored the content and presentation. The school district's policy "confine[d] the content and topic of the student's message" (*id.* at 303) and "encourage[d] the selection of a religious message" (*id.* at 307; see also *id.* at 306 (noting that "the only type of message that is expressly endorsed in the text [of the policy] is an 'invocation'")). The school district also controlled the message's "setting" and mode of presentation (*id.* at 308), determining that the invocation would be delivered via the school's public-address system, "as part of a regularly scheduled, school-sponsored function conducted on school property" (*id.* at 307-308). The "extent of school involvement" in the message rendered the pre-game speech attributable to the school district rather than to individual students. *Id.* at 314. *Santa Fe* did not, however, raise a free-speech issue; so while the Court held that the message was attributable to the government for Establishment Clause purposes (*id.*), there was no need to address whether that fact made the invocation fully the government's speech for purposes of the Free Speech Clause. There is similarly no need here for the Court to address that question because Pleasant Grove has not just shaped the items in Pioneer Park; it has created, commissioned, or adopted them as its own.

beef producers (some but not all of whom were appointed by the Secretary of Agriculture) was "the Government's own speech" when the message conveyed was "effectively controlled by the Federal Government itself." In determining that the campaign constituted government speech, this Court relied on the fact that federal officials had established the program, "set[] the overall message to be communicated," "attend[ed] and participate[d] in the open meetings at which proposals [we]re developed," "specif[ied] * * * what the promotional campaigns shall contain * * * and what they shall not," reviewed "[a]ll proposed promotional messages * * * both for substance and for wording," "rejected or rewr[ote]" some proposals, and "exercise[d] final approval authority over every word used." *Id.* at 560-561.

Likewise, when government commissions private sculptors to design monuments — like the Lincoln Memorial, the Vietnam Veterans Memorial, and other monuments on the National Mall — the items constitute the government's own speech. That is so because the commissioning process is designed to give voice to a governmental vision; the government retains both oversight authority and final approval over the result; and the government ultimately assumes physical control of the items — thereby gaining the right to move, modify, or even destroy them. See, *e.g.*, *Serra* v. *United States Gen. Servs. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988) (Newman, J.) (government had right to remove sculpture it had commissioned, artist's objections notwithstanding).

3. Adopting

Government can also choose to adopt as its own a preexisting private message. Recently, in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), this Court evaluated a privately donated Ten Commandments monument that was installed on the grounds of Texas's State Capitol building. Van Orden raised an Establishment Clause claim, not a free-speech one, so while the Court held that the monument's message was attributable to Texas (see *id.* at 686 (plurality) (recognizing display to be official acknowledgment of religion); *id.* at 701 (Breyer, J., concurring) (evaluating message that "the State itself intended")), there was no need to address whether that fact made the monument fully the State's speech for purposes of the Free Speech Clause.[4] But the Ten Commandments monument in *Van Orden* should be understood as having been adopted by the State as its own speech. Cf. *id.* at 692, 695 (Thomas, J.,

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[4] The Establishment Clause applies both to government speech and to private speech endorsed by the government. See *County of Allegheny* v. *ACLU*, 492 U.S. 573, 599 (1989) ("But the Establishment Clause does not limit only the religious content of the government's own communications. * * * Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message."). And the Clause may even in some circumstances limit private speech in a public forum. See *Santa Fe*, 530 U.S. at 303 n.13 ("A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private, but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause."); see also *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 772 (1995) (O'Connor, J., concurring) ("I see no necessity to carve out * * * an exception to the endorsement test for the public forum context.").

concurring) (referring to Eagles-donated monument as "Government display[]" and "government speech"). For the monument was marked as having been donated to "the people and youth of Texas" (*id.* at 681-682); it had been officially accepted, and its site selected, by the State (*id.* at 682); it was under the State's physical control (*Van Orden* v. *Perry*, 545 F.3d 173, 181 (5th Cir. 2003), aff'd, 545 U.S. 677 (2005) (explaining that Ten Commandments monument had, in past, been taken down and later reinstalled by State employees)); and there was no indication that the State had generally extended to other private groups the right to erect permanent monuments on the State Capitol grounds.

Recognizing the *Van Orden* monument to be Texas's speech would echo this Court's referring to the creche in *Allegheny* as "the county's * * * display." 492 U.S. at 598. Like the *Van Orden* monument, the creche was marked as having been "donated" to the county by a private organization. *Allegheny*, 492 U.S. at 580. And the county had a practice of allowing the creche to "stand[] alone" (*ibid.*) "for over six weeks" (*id.* at 600 n.50) on "the 'main' and 'most beautiful part' of the building that is the seat of county government" (*id.* at 599) — an entitlement that the county did not extend to others (*id.* at 600 n.50). See also *Pinette*, 515 U.S. at 765 (plurality op.) (describing creche in *Allegheny* as "government speech" while holding that private organization's unattended cross was private speech, not endorsed by government, when displayed in location "open to all on equal terms").

B. Pleasant Grove can assemble the items in Pioneer Park without free-speech scrutiny because they are the City's own speech, not because the City has *carte blanche* to exercise editorial discretion.

The government's own speech "is exempt from First Amendment scrutiny." *Johanns*, 544 U.S. at 553; see also *Velasquez*, 531 U.S. at 541 ("viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker"); *Rosenberger*, 515 U.S. at 833 ("when the State is the speaker, it may make content-based choices"). That is true, of course, when government itself scripts the speech at issue. But it is equally true when government commissions a private speaker to do so (see *Johanns*, 544 U.S. at 553); and when it adopts previously private speech as its own (see *Allegheny*, 492 U.S. at 600 n.50 (in light of County's provision of preferential access to Grand Staircase, suit did not "raise * * * 'public forum' issue")).[5]

Pleasant Grove has "effectively controlled" (*Johanns*, 544 U.S. at 560) the content of the items in Pioneer Park. In some instances, the City itself created the item. See, *e.g.*, J.A. 170-171, 172 (referencing Pleasant Grove's first City Hall and the gazebo that

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[5] Forum analysis applies when government opens a space for "private speakers [to] convey their own messages" in "a free and robust marketplace of ideas" (*Rosenberger*, 515 U.S. at 835, 850), although that marketplace may be limited to certain topics or certain types of speakers (see *Ark. Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 678-680 (1998)). Forum analysis does not apply to speech, like that at issue here, that the government has itself crafted or adopted.

City created to evoke popular song); see also J.A. 134-135 (describing City-made structure on which donated log cabin will stand). In other instances, Pleasant Grove actively sought out the items in a process akin to commissioning. See, *e.g.*, J.A. 173-174 (explaining that city officials actively sought donation of Fire Station from private individual for placement in park); J.A. 169-70 (explaining that Historical Commission — which was established by mayor and city council[6] — approached developer of land on which Winter Corral sat, to request item for park). In still other instances, the City took official action to adopt the item as its own. See J.A. 123 ("Mayor Cook stated that a letter be written [to] the Fraternal Order of Eagles accepting the monolith of 'The Ten Commandments'"). Pleasant Grove's adoption is, in some instances, declared on the items' face. See, *e.g.*, J.A. 113 (photograph depicting Ten Commandments monument bearing words "presented to the City of Pleasant Grove and Utah County, Utah"); J.A. 115 (photograph showing Nauvoo Temple Stone's engraving, "Donated by John Huntsman"). And the City retains physical control over all the items. See J.A. 159 (Pleasant Grove's Mayor agrees that Eagles would not have right to remove Ten Commandments monument because "the city controls whether or not that monument * * * remains in the park").

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[6] See Pleasant Grove, Pleasant Grove Historic Commission, at http://www.plgrove.org/index.php?option=com_content&task=view&id=2&Itemid=23&limit=1&limitstart=2 (last visited June 17, 2008).

Furthermore, the City has granted each item a unique and prominent governmental platform that is not — and cannot be — made available to all comers. See Pet. App. 1h (access policy noting that "there is a limited amount of park space within the city," that "permanent structures" impede City's efforts to "preserve its public open space," and that City Council should assess "the effect said placement will have on the remaining open space on the public property"). And in some instances, the City has given items a particularly prominent setting within the park. J.A. 123 ("Mayor Cook stated that a letter be written [to] the Fraternal Order of Eagles * * * stating [that Ten Commandments Monument] would be placed in a prominent place in the Rose Garden Park"); J.A. 151 (stating that City moved gazebo in order to position Winter Corral in "ideal place" in park).

Indeed, it is unclear whether a municipality could ever open a forum for permanent monuments, for the very nature of a permanent monument is that its location is forever taken and can never be provided to another item. That simple fact distinguishes permanent monuments from virtually any other kind of speech, including parades, protests, portable artwork, verbal presentations, and even unattended, temporary displays like the one at issue in *Pinette* — all of which appear in locations that can, at other dates and times, be made available to other speakers.

But this Court need not address in this case whether it is possible to open a forum for permanent monuments because Pleasant Grove has not allowed permanent private expression in the park. It has

instead reserved the park for monuments that it has crafted and adopted. So no forum has arisen, even if one were feasible, and the City's choices are "exempt from First Amendment scrutiny." *Johanns*, 544 U.S. at 553.

Pleasant Grove argues that its choices are exempt from free-speech scrutiny not because it created or adopted the monuments in Pioneer Park, but because it exercised editorial discretion in amassing them (see Pet. Br. 26-34), a context in which government communicates its own message (see, *e.g.*, *Forbes*, 523 U.S. at 674). That argument conflates two distinct categories of official action and, in the process, threatens to swallow, wholesale, free-speech jurisprudence as we know it. The Free Speech Clause's principal purpose is to *curb* government's discretion to discourage speech's seeing the light of day. See, *e.g.*, *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130-131 (1981) ("This Court has not hesitated * * * to hold invalid laws which it concluded granted too much discretion to public officials" to inhibit speech). To be sure, there may be some instances, such as the competitive award of excellence-based NEA grants, in which it is "simply inconceivable" for government not to exercise discretion. *Nat'l Endowment for the Arts* v. *Finley*, 524 U.S. 569, 586 (1998); accord *United States* v. *Am. Library Ass'n*, 539 U.S. 194, 205 (2003) ("forum analysis and judicial scrutiny are incompatible with the role of public television stations[,] the role of the NEA, * * * [and] the discretion that public libraries must have to fulfill their traditional missions"). But in those situations, exercising discretion to include an

item does not transform the item into the government's own speech: No one would suggest that Karen Finley's chocolate-smeared breasts would have become the government's own speech if the work had been funded. And the Free Speech Clause continues to limit the government's discretion. See, *e.g.*, *Finley*, 524 U.S. at 587 (recognizing limitations on using government subsidy to penalize disfavored viewpoints); *Bd. of Educ.* v. *Pico*, 457 U.S. 853, 870-871 (1982) (recognizing impermissibility of removing books from public-school library in effort to "suppress[] * * * ideas"). Governmental discretion is not, in those instances, "exempt from First Amendment scrutiny," as it would be if the government itself had crafted the speech. See *Johanns*, 544 U.S. at 553. So Pleasant Grove grossly, and dangerously, oversimplifies the issue in this case when it treats the exercise of editorial discretion as transforming included items into government speech in the same way that speech is the government's when the government itself crafts or adopts the message. See, *e.g.*, Pet. Br. at 26-29 (discussing in same breath, and without distinction, *Finley*, *American Library Ass'n*, and *Forbes*, on the one hand, and *Johanns*, on the other).

If Pleasant Grove had done nothing more than to sit back and exercise subjective discretion over requests to place items permanently in Pioneer Park, Summum's free-speech claim would be far stronger, because granting permanent access to a public park is not a context in which avoidance of editorial discretion is "simply inconceivable." *Finley*, 524 U.S. at 586. As described above, however, Pleasant Grove has done much more here than that: It has actively crafted,

commissioned, or adopted the permanent monuments as its own. It is for that reason — not because government gains a *right* of editorial discretion whenever it chooses to *exercise* discretion — that the City's judgments about the items to be installed in the park are unimpeded by the Free Speech Clause.

The City's ability to craft its message is not, however, altogether unfettered: The City remains subject to constitutional provisions that limit the government's speech — the pertinent one being the Establishment Clause. See, *e.g.*, *Pinette*, 515 U.S. at 767 (plurality op.) (Establishment Clause limits "the words and acts of government").[7]

II. The Establishment Clause Provides the Proper Legal Framework for Analyzing Summum's Claim.

Because of the peculiarities of Tenth Circuit jurisprudence, Summum couched its legal claims principally in the language of free speech and viewpoint discrimination. The proper locus of its complaint is, however, the Establishment Clause — which the Founders intended to serve as the principal bulwark against the government's resort to rank

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[7] Although there may be some disagreement among the Justices of this Court over the application of the Establishment Clause to private speech (see note 4, *supra*), even those with the narrowest view of the Clause's reach have acknowledged that the Clause applies to "expression by the government itself," and to "government action alleged to discriminate in favor of private religious expression or activity." *Pinette* 515 U.S. at 764 (plurality op.).

denominational prejudice. And although Summum has yet to develop its Establishment Clause claim and marshal its evidence, there is enough in the record to suggest that Pleasant Grove's conduct may well have had a discriminatory object.[8]

A. The Establishment Clause forbids denominational preferences.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). That conclusion flows inexorably from the Founders' vision.

1. Denominational preferences were anathema to the Founders' view of religious liberty.

While the United States was certainly more homogeneous in 1789 than it is today, the Framers nonetheless inhabited a religiously diverse society. Congregationalists maintained a stronghold in New England; Anglicans dominated religious life in the South; and Quakers influenced society significantly in Pennsylvania. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 45 (2000);

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[8] Summum raised, though it did not press, a claim under the Utah Constitution's Establishment Clause. Pet. App. 4a. It could, of course, amend its complaint to include a federal Establishment Clause claim; but because Utah's Constitution provides more expansive protections than the federal Establishment Clause does, any federal violation would also violate state law. See generally *Manning*, 517 P.2d at 552-553 (Callister, Henriod, and Crockett, JJ., concurring). So for the sake of simplicity, *amici* limit our discussion to the relevant First Amendment precedents.

WINTHROP S. HUDSON, RELIGION IN AMERICA 46 (3d ed. 1981). Even within each colony, diversity abounded: Jews enjoyed a strong presence in Rhode Island; Baptists and Presbyterians in Virginia; and Catholics in Maryland. See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421-1430 (1990). By the time the First Amendment was ratified, "the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world." *Id.* at 1421. The Framers thus understood that they were "designing a government for a pluralistic nation — a country in which people of different faiths had to live together." JON MEACHAM, AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION 101 (2006). "Pluralism was * * * not just a sociological fact for the founders. It was also a constitutional condition for the guarantee of religious liberty." JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 48 (2d ed. 2005) (citing THE FEDERALIST NOS. 10, 51 (James Madison)).

The Founders thus repeatedly emphasized the need to maintain strict governmental neutrality both among sects and in all matters touching on religion. John Adams wrote, for example, that "all men of all religions consistent with morals and property [must] enjoy equal liberty, * * * security of property * * * and an equal chance for honors and power." Letter from John Adams to Dr. Price (Apr. 8, 1785) (quoted in WITTE, *supra*, at 49). George Washington affirmed that "the government of the United States * * * gives to [religious] bigotry no sanction, to persecution no assistance." Letter from

George Washington to the Jews (Aug. 18, 1790), in THE SEPARATION OF CHURCH AND STATE: WRITINGS ON A FUNDAMENTAL FREEDOM BY AMERICA'S FOUNDERS 110 (Forrest Church ed., 2004). Similarly, Thomas Jefferson extolled Virginia's passage of his Bill for Religious Freedom — which "had the same objective and w[as] intended to provide the same protection against governmental intrusion on religious liberty" as the federal Establishment Clause (*Everson* v. *Bd. of Educ.*, 330 U.S. 1, 13 (1947)) — as "proof that [the people] meant to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of every denomination" (THOMAS JEFFERSON, WRITINGS 40 (Merrill D. Peterson ed., Library of Am. 1984)).

And no one was more committed to this principle than the chief architect of the First Amendment, James Madison. In opposing Patrick Henry's proposal that Virginia fund "Teachers of the Christian Religion," Madison thoroughly denounced all denominational preferences: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 3 (1785), reprinted in *Everson*, 330 U.S. at 63-72 (appendix to dissent of Rutledge, J.). "A just government," he declared, is "best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another." *Id.* ¶ 8.

2. This Court has consistently recognized the strict prohibition against denominational preferences.

True to the Framers' intent, "[i]n * * * Establishment Clause cases [this Court has] often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) (citing cases). Time and again, this Court has recognized that "the Constitution * * * mandates * * * tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984).[9] Thus, while this

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[9] See, *e.g.*, *McCreary*, 545 U.S. at 876 ("The Framers and the citizens of their time intended * * * to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate"); *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 703 (1994) ("a principle at the heart of the Establishment Clause" is "that government should not prefer one religion to another"); *Wallace* v. *Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The [Establishment] Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others."); *Larson*, 456 U.S. at 246 ("'fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief'" (quoting *Sch. Dist.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring))); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970) ("basic purpose" of Religion Clauses "is to insure that no religion be sponsored or favored, none commanded, and none inhibited"); *Epperson* v. *Arkansas*, 393 U.S. 97, 103-104 (1968) ("Government * * * may not be hostile to any religion * * * and it may not aid, foster, or promote one religion or religious theory against another"); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects." (quoted in *Larson*, 456 U.S. at 246)).

Court has also routinely recognized Establishment Clause protections beyond the prohibition against denominational preferences,[10] even those who take the narrowest view of the Clause's reach support the application of the Clause to forbid religious favoritism.[11]

Indeed, so central is this principle to the First Amendment's framework for safeguarding religious liberty that it informs this Court's jurisprudence under *both* Religion Clauses. As the Court explained in *Larson*, the "constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause"

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[10] See, *e.g.*, *McCreary*, 545 U.S. at 860 (holding that it is impermissible for government to "'send[] the . . . message to . . . nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members. . . .'" (quoting *Santa Fe,* 530 U.S. at 309-310 (citation omitted))); *Grumet*, 512 U.S. at 703 ("a principle at the heart of the Establishment Clause [is] that government should not prefer * * * religion to irreligion"); *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992) ("at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise").

[11] See, *e.g.*, *Wallace* 472 U.S. at 98 (Rehnquist, J., dissenting) (recognizing that Founders aimed to prevent imposition of national religion and discrimination among sects, while doubting that Madison also sought to prevent discrimination against nonreligion). But cf. *McCreary*, 545 U.S. at 893 (Scalia, J., dissenting) (acknowledging rule against denominational preferences "where public aid or assistance to religion is concerned" and "where the free exercise of religion is at issue," but arguing that it protects only monotheistic faiths with respect to "public acknowledgment of the Creator").

because "[f]ree exercise * * * can be guaranteed only when legislators — and voters — are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." 456 U.S. at 245-246 (citing *Ry. Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally")).[12]

In short, while some questions about the scope of the Religion Clauses may divide constitutional scholars and jurists, there can be no serious doubt that the Establishment Clause proscribes denominational preferences.[13] And that principle must remain inviolate

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[12] See also *Locke* v. *Davey*, 540 U.S. 712, 725 & n.8 (2004) (upholding, under Free Exercise Clause, scholarship program excluding devotional-theology students, where nothing in program's history, text, or operation suggested religious animus and program did not "'single out' anyone for 'special burdens'" on basis of religion); *Lukumi*, 508 U.S. at 532 (just as Establishment Clause bars official disapproval of any sect, "protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"); *Gillette* v. *United States*, 401 U.S. 437, 449 n.14, 452-453 (1971) (facially neutral selective-service statutes' discriminatory impact on religious sects did not violate Establishment or Free Exercise Clauses because no discriminatory object); *Fowler* v. *Rhode Island*, 345 U.S. 67, 69-70 (1953) (First Amendment requires allowing Jehovah's Witnesses to preach publicly on same terms as other religious groups and prohibits "preferring one religion over another" and disfavoring "unpopular group").

[13] The principle extends even beyond the First Amendment's Religion Clauses. It finds expression, for example, in the no-

in order both to "carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society" and to maintain religion "as a matter for the individual conscience, not for the prosecutor or bureaucrat." *McCreary,* 545 U.S. at 882 (O'Connor, J. concurring).

B. When government acts with religious animus, it stigmatizes the disfavored minority and threatens religious liberty.

Denominational preferences are so inimical to our constitutional order that this Court has looked to race-discrimination jurisprudence as the source for the applicable legal standard: "[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Larson*, 456 U.S. at 246;[14] accord

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religious-test clause, which ensures that no sect may ever have a monopoly on the offices or emoluments of government. See U.S. Const. Art. VI; *Torcaso* v. *Watkins*, 367 U.S. 488, 495 n.10 (1961) (In debating passage of Article VI, James Iredell stated, "'[i]t is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?'").

[14] Reflecting the Founders' particular disdain for sectarian preferences, this Court explained in *Larson* that the more relaxed *Lemon* test was "intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions * * * that discriminate *among* religions." 456 U.S. at 252. The Court has subsequently noted: "*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether

Employment Div. v. *Smith*, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race * * * so too we strictly scrutinize governmental classifications based on religion."); see also *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-304 (1976) (per curiam) (race and religion are "suspect distinctions" under Equal Protection Clause). That is because the Religion Clauses and "the Equal Protection Clause as applied to religion[] all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Grumet*, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in judgment).[15]

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the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon* * * *." *Hernandez* v. *C.I.R.*, 490 U.S. 680, 695 (1989). The different tests do not, however, yield different outcomes: A governmental act "born of [religious] animus" also fails *Lemon*. *Id.* at 696.

[15] See also *Lukumi*, 508 U.S. at 540 (Kennedy, J.) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."); *Walz*, 397 U.S. at 696 (Harlan, J., concurring) ("Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."); cf. *Gillette*, 401 U.S. at 449 n.14 (challenges to conscientious-objector law brought under Equal Protection and Religion Clauses addressed together because they were "not * * * independent argument[s]").

Thus, in religion cases as well as race cases, laws that appear facially neutral but are nonetheless tailored to advance a discriminatory purpose are invalid. Compare *Lukumi*, 508 U.S. at 534 (both Establishment and Free Exercise Clauses "extend[]

That the constitutional analysis is the same follows from the fact that the injury is analogous: Governmental action rooted in irrational prejudice "denigrates the dignity" of the disfavored racial or religious group by placing on its members "'a brand * * *, affixed by the law, an assertion of * * * inferiority.'" *J.E.B.* v. *Alabama ex rel T.B.*, 511 U.S. 127, 142 (1994) (quoting *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879));[16] see also *Larson*, 456 U.S. at 254-255 (striking down state statute treating some

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beyond facial discrimination"), and *Gillette*, 401 U.S. at 452 ("The question of governmental neutrality is not concluded by the observation that [a statute] on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses."), with *Shaw* v. *Reno*, 509 U.S. 630, 644 (1993) (redistricting legislation, though "ostensibly neutral," was "so bizarre on its face" that it was "an obvious pretext for racial discrimination").

[16] Accord, *e.g.*, *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."); *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991) (equal protection concerned with preventing race-based "stigma or dishonor"); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (racial classifications cause "stigmatic harm" and undermine right of all "to be treated with equal dignity and respect"); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 625 (1984) ("stigmatizing injury" caused by race- and gender-based discrimination "deprives persons of their individual dignity"); *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

denominations more favorably than others where statute's legislative history revealed hostility toward "Moonies"). For while conduct that is facially neutral and only incidentally places a special burden on a particular group may be permissible (see, *e.g.*, *Smith*, 494 U.S. at 883; *Washington* v. *Davis*,426 U.S. 229, 242 (1976)), when government acts on "irrational prejudice" (*City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 449-450 (1985)) — "'because of,' not merely 'in spite of,'" that disparate impact (*Lukumi*, 508 U.S. at 540 (Kennedy, J.) (quoting *Pers. Adm'r* v. *Feeney*,442 U.S. 256, 279 (1979))) — it inflicts an unconstitutional dignitary injury on the members of the disfavored group.[17] Religion plays so central a role in civic as well as personal identity in American society that when government associates itself with, or expresses a preference for, any denomination, it marks those of other faiths with a badge of inferiority just as insidious as when government prefers one race to another.

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[17] The Court has recognized this principle in a wide range of contexts. See, *e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003) (striking down antisodomy statute as embodying anti-gay prejudice); *Romer* v. *Evans*, 517 U.S. 620, 632 (1996) (striking down state constitutional provision barring extension of antidiscrimination protections to gay men and lesbians as "inexplicable by anything but animus toward the class it affects"); *Cleburne*, 473 U.S. at 448, 450 ("mere negative attitudes, or fear * * * are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like"; they reflect only "an irrational prejudice"); *USDA* v. *Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 126-128 (2007). For religion, like race, is such a critical "marker[] of social division" that official denominational preferences effectively perpetuate a religiously based social-caste system. *Id.* at 127-128.

That is so even when the tangible effect of the differential treatment is minimal. *Id.* at 128 (comparing harms from religious endorsements to harms that Justice Harlan identified in *Plessy* v. *Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting), where although separate-but-equal railway cars may not have interfered with passengers' ability to reach their final destinations, segregation nonetheless marked blacks as "so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens"). So although the tangible effect of any religious animus here may be only to deprive Summum of a governmental platform to propagate its views, that fact does not immunize Pleasant Grove's conduct to Establishment Clause challenges any more than if the City had enacted a policy of displaying Christian monuments but not Hindu or Scientologist ones.

But the harm caused by sectarian religious animus is not stigma alone. It is, more generally, the religiously based strife that is bound to result when the animus remains unchecked — a threat that the Founders sought to guard against:

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife,

> and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.

Everson, 330 U.S. at 8-9; see also Madison, *Memorial and Remonstrance* ¶ 11 ("Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.").

The Founders' aim was not simply to avoid theocracy (cf. THE FEDERALIST NO. 10 (James Madison) (observing that multiplicity of political factions ensures that none attains dominion over others)), but also to safeguard complete freedom of conscience by fostering a marketplace of religious beliefs akin to the Free Speech Clause's marketplace of ideas: "Madison's vision — freedom for all religion being guaranteed by free competition between religions — naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of

official denominational preference." *Larson*, 456 U.S. at 245.[18]

Thus, in order to evaluate Summum's real claim in this case — that Pleasant Grove acted with religious animus in refusing to display the Seven Aphorisms — it will be necessary for the parties to adduce, and the reviewing courts to consider, evidence about the City's actions, including the historical background of the decision being challenged, the series of events leading to that decision, the administrative history, and contemporaneous statements made by the decisionmakers, all of which are "objective factors [that] bear on the question of discriminatory object." *Lukumi*, 508 U.S. at 540 (Kennedy, J.).

C. There is reason to suspect that Pleasant Grove acted with religious animus.

Because of the way that Tenth Circuit law distorted the parties' litigation of this case, there is only a limited record on whether Pleasant Grove acted with religious animus in denying Summum's request to display the Seven Aphorisms. But there is already enough to suggest that the object of Pleasant Grove's

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[18] Perhaps the parallels between the conceptions of religious competition and competition among expressive viewpoints may help explain why the Tenth Circuit turned to free-speech jurisprudence to fill the gap in its Establishment Clause jurisprudence wrought by *Anderson*. But because the Religion Clauses absolutely prohibit government's weighing in on religious questions or affording special recognition to any denomination's views, whereas the Free Speech Clause forbids only government's distorting or silencing private speech, the fit was bound to be imperfect, thus leading to the odd result here.

actions may not have been pure, and that Summum may therefore have a viable Establishment Clause claim.

For decades Pleasant Grove accepted and erected monuments in Pioneer Park without passing an access policy. Only after Summum persisted in its efforts did the City propound a policy — one that, perhaps not coincidentally, screened Summum out.

The City claims that the policy *requires* it to reject Summum's request because Summum's proposed monument does not "directly relate to the history of Pleasant Grove." J.A. 61. But if the access policy sets forth mandatory requirements, the City has not followed its own rules. For nothing either on the face of the Ten Commandments monument or elsewhere in the record suggests any connection between that monument and the City's history. Cf. Pet. App. 2h-3h ("item must directly relate to the history of Pleasant Grove and have historical relevance to the community"). In other words, even if the Decalogue itself had any connection to Pleasant Grove's history, *this* Ten Commandments monolith does not. The monument was not, for example, "at least fifty years old" when accepted; it was not "directly associated with events of historic significance in the community"; and it did not "exhibit significant methods of construction * * * used within the historic period." Pet. App. 3h. When donated, it was a contemporary creation, not a historical relic.

And even if the Ten Commandments monolith had been a historical relic, the policy also requires that monuments be donated by "an established Pleasant

Grove civic organization with strong ties to the community" or an individual with "a historical connection to Pleasant Grove City." Pet. App. 2h. Because Pleasant Grove's Eagles aerie was barely two years old when the City accepted the donation (see Pet. App. 2a-3a), the monolith fails that requirement too.[19] Discovery may reveal an equally poor fit between the policy and other items in the park.

The timing of the policy's issuance, combined with the policy's all-too-convenient exclusion of Summum and questionable applicability to other monuments, suggests that Pleasant Grove may have engaged in "religious gerrymandering" by drafting and interpreting its rules for donated displays "with the explicit intention of including particular religious denominations and excluding others." *Larson*, 456 U.S. at 254-255; accord *Lukumi*, 508 U.S. at 540 (Kennedy, J.).[20]

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[19] The City attempted to justify the Ten Commandments' inclusion by claiming that the access policy allows for monuments that are historically relevant *or* were given by a qualifying organization, notwithstanding the policy's plain language (which presents the requirements as conjunctive). See J.A. 188-189. The City's strained reading to save the Ten Commandments while excluding Summum provides further evidence that the object of the City's actions may be improper.

[20] The Establishment Clause violation — if one occurred — was Pleasant Grove's discriminatory treatment of Summum, not its failure to speak in Summum's voice. So the remedy would not necessarily be to require Pleasant Grove to erect the Seven Aphorisms. It would be up to the district court to craft a suitable remedy in the first instance, taking into account whether Pleasant Grove's display of the Aphorisms would itself violate the Establishment Clause and whether damages or other remedies might make Summum whole.

CONCLUSION

This Court should reverse the judgment below, clarifying in the process that the Establishment Clause, not the Free Speech Clause, provides the proper framework for adjudicating Summum's claims of denominational preference and religious animus.

Respectfully submitted.

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APPENDIX

APPENDIX A

DESCRIPTIONS OF THE *AMICI*

American Jewish Committee

The American Jewish Committee, a national organization of approximately 175,000 members and supporters and 32 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans. AJC believes it is critically important to the well-being of a pluralistic society that government not be permitted to favor some religions to the detriment of others. Such favoritism, as this Court has previously recognized, is contrary to our constitutional tradition and the great American experiment.

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases decided by this Court and the lower federal and state courts nationwide.

Anti-Defamation League

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races to combat racial, ethnic, and religious prejudice in the United States. Today ADL is one of the world's leading organizations fighting anti-Semitism, hatred, discrimination, and all forms of bigotry. ADL believes that its stated goals, as well as the general stability of our democracy, are well-served through strict separation of church and state and commensurately strict enforcement of the Free Exercise Clause.

ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: "[A] union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962).

Baptist Joint Committee for Religious Liberty

The Baptist Joint Committee for Religious Liberty is a 70-year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. The BJC deals exclusively with religious-liberty and church-state-separation issues, and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to ensuring religious liberty for all Americans. The BJC has participated as an *amicus curiae* in many of the major religious-liberty cases before this Court.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases concerning religious liberty and the separation of church and state. PFAWF has joined in filing this *amicus curiae* brief in order to help ensure the continued vitality of the First Amendment principle that government must not be permitted to favor one religion over another.